cannot see how it can possibly be argued that the decision in that case helps the respondents in this case. Section 80(2)(a) contemplates the giving of notice of the proceedings in which the judgment was given. In my opinion there can be no notice of such proceedings unless it is stated in unequivocal terms that the parties intend to file an action for the recovery of damages. The notice in this case was not a notice of action but a notice of claim, which is not the same thing as a notice of action.

It has been argued on behalf of the respondents that when damages are claimed the ultimate result must necessarily be an action. With respect that may not always be the case. If, for instance, the claim is admitted there may be no action. In any event, if the ultimate result contemplated is an action, it must be so stated in the letter so as to leave no doubt in the mind of the insurer. As stated in Halsbury, 3rd Edition, Volume 22, page 376, paragraph 770, "the notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings, but no particular formality is required, nor is there any need to plead the giving of notice." If the letter in this case had gone on to say that action would be brought if liability was not admitted or no reply given by a certain date or within so many days, or words to that effect, it would have been a proper notice. I do not think that an experienced and astute solicitor would draw up a notice of action in the terms in which this letter was couched.

It is to be observed that section 80(3) of the Ordinance enables the insurer to obtain a declaration of non-liability on certain grounds in legal proceedings instituted for the purpose, provided that they are instituted before the expiration of a specified period and provided, in certain circumstances, that notice is given of the proceedings by the insurer to the injured party within a prescribed time. One of the objects, though not the sole object, of the notice of proceedings under section 80(2)(a) of the Ordinance is to enable the insurer to institute his proceedings under section 80(3) of the Ordinance within time.

In all the circumstances of the case and in view of what I have stated above, I am of the opinion that the learned Magistrate was wrong in holding that the appellants as insurers had had a notice of the proceedings against the insured, and consequently in giving judgment against them. Therefore the appeal is allowed and the judgment of the Court below reversed. There will accordingly be an order that the judgment of the Magistrate be set aside and that the action before him do stand dismissed. Before concluding the matter, however, I must say that I allow this appeal with very great reluctance and because I feel that I have no option but to do so. The respondents have my profound sympathies, because it seems to me that they find themselves in the position in which they are because the letter written on their behalf to the appellants did not contain a few more words so as to make it a proper notice under the Ordinance. The respondents will also have to bear the costs of this appeal and of the action in the lower Court, and I make an order accordingly.

Appeal allowed.

Solicitors:—*Khoo Eng Chin & Co.; Skrine & Co.*

RE P. W. AU-YONG; *EX-PARTE* M. DICUM

[O.Bk.J. (Gill J.) June 3, 1963]

[K.L. — In Bankruptcy No. 34 of 1963]

Bankruptcy—Counter-claim by debtor—Indorsement on Bankruptcy Notice regarding counter-claims and set-offs—Affidavit of such to be filed within seven days—Failure to file—Whether counter-claim could be set up as defence to oppose Bankruptcy Notice.

Practice and Procedure—Personal service of Bankruptcy—Notice evaded by debtor—Order made for substituted service—Order that copies of notice and of order be posted—Argument by debtor that this did not comply with rules 95 and 107 of Bankruptcy Rules 1921—Whether substituted service bad.

After three unsuccessful attempts by a process server of the court to serve on the debtor a Bankruptcy Petition obtained by the petitioning creditor, the latter obtained an order for substituted service which read, "the Bankruptcy Notice on the debtor be served by posting copies of the notice, together with copies of the order for substituted service on the notice boards of the Supreme Court and the Magistrate's Court and on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence." Service in this form was duly effected.

The debtor opposed the Bankruptcy Petition on the ground that the Bankruptcy Notice was not duly served on him because it did not bear the seal of the court and the signature of the Registrar under whose hand it was issued, and that such service was contrary to rules 95 and 107 of the Bankruptcy Rules, 1921.

Held: (1) rules 95 and 107 of the Bankruptcy Rules 1921 would have been applicable if the service had been personal service. The service effected in the case was substituted service and such service must be in accordance with the terms of the order made for substituted service.. The service made complied with the terms of the order and was therefore good;

(2) with regard to the ground raised by the debtor that he had a counter-claim against the petitioning creditor which exceeded the amount claimed in the Bankruptcy Notice the debtor should have applied within seven days of the service of the Bankruptcy Notice to set it aside in accordance with the endorsement on the notice. His failure so to do left no merit in this ground.

Cases referred to:—

(1) *In re G. E. B. Homer, a Debtor* [1903] 2 K.B. 340, 349.

(2) *Muthiah Chettiar ex parte Ramanathan Chettiar* [1938] M.L.J. 233.

BANKRUPTCY PETITION.

S. D. K. Peddie for the petitioning creditor.

K. L. Devaser for the debtor.

Rajendram for the Official Assignee.

Gill J.: The Bankruptcy Petition in this case dated the 12th April, 1963 was founded on a Bankruptcy Notice dated the 5th of February, 1963, which in turn was based on the final judgment obtained by the petitioning creditor against the debtor in Civil Suit No. 341 of 1962 in this Court on 3rd July, 1962 in the sum of $26,674.08.

Three attempts on separate dates were made by a process server of this Court to effect personal service of the Bankruptcy Notice on the debtor. On the first visit by the process server to the debtor's house at No. 9A Keng Hooi Road, Kuala Lumpur on 15th February, 1963, the debtor refused to come out to meet the process server. On the process server's second visit on 18th February, 1963 the debtor went into a room and disappeared through another door of the room, and on the third visit on 20th February, 1963 he was not to be found in the house. The petitioning creditor then applied for and obtained an order of this Court for substituted service of the Bankruptcy Notice on the debtor.

The order for substituted service dated the 18th of March, 1963 provided that the Bankruptcy Notice on the debtor be served by posting copies of the notice, together with copies of the order for substituted service, on the notice boards of the Supreme Court and the Magistrate's Court, Kuala Lumpur and on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence of the debtor. The order further provided that such postings shall be deemed good and sufficient service on the debtor seven days after the date of the last of such postings and that the time for service of the Bankruptcy Notice be extended for four months from the date of its issue. The postings in accordance with that order were done by a process server of this Court on 25th March, 1963 and an affidavit by him to that effect was filed on the same day.

The Bankruptcy Petition was opposed on the ground (a) that the debtor had a counterclaim against the petitioning creditor in the sum of $27,000/-, being fees for professional services rendered by the debtor, presumably as an advocate and solicitor of the Supreme Court, and (b) that the Bankruptcy Notice was not duly served on him, because it did not bear the seal of the Court and the signature of the Registrar under whose hand it was issued.

As regards the question of counter-claim, the Bankruptcy Notice had an endorsement on it in the following terms:

> "If, however, you have a counterclaim, set-off or cross-demand which equals or exceeds the amount claimed by M. Dicum of No. 229 Ampang Road, Kuala Lumpur, in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained you must within seven days apply to the Court to set aside this Notice by filing with the Registrar an Affidavit to the above effect."

The debtor took no steps to have the Bankruptcy Notice set aside in accordance with that endorsement. Indeed, this ground was not very seriously pressed by the learned counsel for the debtor. In this connection the learned counsel for the petitioning creditor referred to section 31(1) of the Bankruptcy Ordinance, 1959 which gives the Official Assignee certain powers to collect debts due to the debtor. He also contended that the alleged counterclaim should have been raised in the Civil Suit which is the basis of these bankruptcy proceedings. In this connection he referred to the case of *In re G. E. B. Homer, a Debtor*(1). As the debtor did not set up this counterclaim in the Civil Suit or take steps to have the Bankruptcy Notice set aside on that ground, I did not consider there was any merit in this ground.

The ground as regards service of the Bankruptcy Notice was the only substantial ground on which the debtor relied. His counsel argued that a sealed copy of the Bankruptcy Notice should have been served on the debtor in accordance with Rules 95 and 107 of the Bankruptcy Rules, 1921. In support of this argument he cited the case of *Muthiah Chettiar ex parte Ramanathan Chettiar*(2). To my mind the fallacy in that argument lay in the fact that in the present case there was no personal service of the Bankruptcy Notice. It was through the debtor's own fault that resort had to be made at substituted service of the notice. Substituted service is dealt with in Rule 108 of the Bankruptcy Rules, which provides, *inter alia*, that such service may be made in such manner as the Court may direct. The direction of the Court as to substituted service was that copies of the Bankruptcy Notice be posted at various places, and this direction was strictly complied with.

The object of substituted service is to bring the relevant proceedings to the notice of the person to be served. The notice in this case was in the prescribed form and the copy of the order for substituted service itself was posted along with the copy of the Bankruptcy Notice. It could not be said that the debtor, who is a solicitor and therefore an officer of the Court, did not know the nature and effect of the documents. I was therefore satisfied that there had been

good, sufficient and proper service of the Bankruptcy Notice on the debtor. In all the circumstances of the case, and in view of the provisions of section 131 of the Bankruptcy Ordinance, 1959, I made receiving and adjudication orders against the debtor in terms of the creditor's petition.

Receiving and adjudication orders made.

Solicitors:—*Skrine & Co.; K. L. Devaser & Co.*

KAM HOY TRADING v. KAM FATT TIN MINE

[C.A. (Hill and Barakbah J.A., and Ismail Khan J.) June 3, 1963]

[K.L. — F. M. Civil Appeal No. 17 of 1963]

Practice and Procedure—Leave to amend pleadings after close of case and before judgment—R.S.C., O.28, r.1.

Although Order 28 rule 1 of the Rules of the Supreme Court 1957 gives the judge a discretion to give leave to amend indorsements or pleadings at any stage of the proceedings, this is a discretion which must be exercised judicially.

Where hearing is ended and judgment reserved, a judge has discretion, before judgment is delivered, to give leave for the statement of claim to be amended.

Such amendment may be permitted where it will set out in the pleadings that which has emerged in the course of the case as an issue between the parties or where the fact which is the subject matter of the amendment has been referred to by the counsel in opening and evidence about it has been given.

Cases referred to:—

(1) *Loutfi* v. *C. Czarnikew*, [1952] 2 All E.R. 823.

(2) *Weldon* v. *Neal* (1887) 19 Q.B.D. 394.

COURT OF APPEAL.

L. P. Thean for the appellants.

S. T. Chung for the respondents.

Barakbah J.A.: This is an appeal against the decision of Suffian J. in giving judgment for the plaintiffs against the defendants in the sum of $6,408.65 together with interest at the rate of 6% per annum and costs. The appeal was allowed with costs and it was intimated by the Court that it would give its reasons at a later date.

The claim as stated in the original statement of claim dated the 10th day of March 1959 was $6,689.45 with interests and costs.

On 3rd day of April 1959 the defendants, now the appellants in the present appeal filed their statement of defence.

On the day of the hearing i.e. 31st October 1961 counsel for the defendants applied for permission to amend the statement of defence by adding the following new paragraph.

"3. In the alternative, the defendant, Sze Toh Wah, pleads the Limitation Ordinance 1953 to the plaintiff's case."

Mr. Lye, counsel for the plaintiffs stated that he had no prior notice but left the matter to the Court. The Court granted the application and the statement of defence was accordingly amended. The hearing then proceeded and judgment was reserved till 6th November 1961.

On the day for delivery of judgment i.e. 6th November 1961, counsel for the plaintiffs applied for postponement as he was applying by way of motion to call fresh evidence which, as it was alleged, was not available at the time of trial. The Court again adjourned the hearing and later the application to adduce further evidence and to amend the statement of claim was granted. The claim in the amended statement of claim was for the sum of $6,408.65, being the balance due on account of the value of goods supplied to the defendants' firm.

On 30th July 1962, hearing was resumed and further evidence of P.W. 3, one of the partners in defendants' firm was taken. A document in Chinese Exhibit P.8 was admitted with no translation although the learned trial Judge inserted what purported to be a translation of it in his judgment. In my opinion the proper procedure would be for a certified translation to be put in as an Exhibit. On 27th February 1963 he delivered his reserved judgment in favour of the plaintiffs as claimed in the amended statement of claim.

There were several grounds of appeal but the main one was that the learned Judge wrongly exercised his discretion in allowing the respondents, after the close of the case while judgment was reserved, leave to adduce further evidence and to amend the statement of claim. The learned counsel for the appellants stated that such evidence was available and could and should have been brought by the respondents at the commencement of the trial.

Furthermore he said that counsel for the respondents stated that he had no prior notice of the application to file the amended statement of defence but left the matter to the Court which granted it. He should have applied for an adjournment but he did not. He went on to say that generally the Court would give leave to let in fresh evidence which was not available at the time of the trial, but in this case respondent was not taken by surprise, as he stated in his evidence. "I received no money despite my demands..... The debt of $6,689.45 was in respect of oil supplied before November 1952.